2003

State of Utah v. Dustin Marshall : Brief of Appellant

Utah Court of Appeals

Mark L Shurtleff. Utah Attorney General
Walter F. Bugden, Jr. , Tara L. Isaacson Bugden and Isaacson, L.L.C.

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, v. DUSTIN MARSHALL, Defendant/Appellant.	:	Case No. 20030868-CA (Not Incarcerated)

OPENING BRIEF OF APPELLANT

This is an appeal from one conviction of equity skimming, a third degree felony, in violation of Utah Code Ann. §76-6-522, and for four convictions of acting in capacity without a license when required, a class A misdemeanor, in violation of Utah Code Ann. § 41-3-201, entered in the Eight Judicial District Court for Uintah County, State of Utah, the Honorable A. Lynn Payne, Judge, presiding.

MARK L. SHURTLEFF
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

WALTER F. BUGDEN, JR. (480)
TARA L. ISAACSON (7555)
BUGDEN & ISAACSON, L.L.C.
623 East 2100 South
Salt Lake City, Utah 84106
Telephone: (801)476-1700
Facsimile: (801)467-1800

Attorneys for Appellant

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TARA L. ISAACSON (7555)
BUGDEN & ISAACSON, L.L.C.
623 East 2100 South
Salt Lake City, Utah 84106
Telephone: (801)476-1700
Facsimile: (801)467-1800

Attorneys for Appellant

MARK L. SHURTLEFF
Utah Attorney General
160 East 300 South, Sixth Floor
P.O. Box 140854
Salt Lake City, UT 84114-0854

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JURISDICTION

Utah Code Ann. § 78-2a-3(2)(e) provides this Court's jurisdiction over this appeal from a court of record involving criminal convictions less than first degree felonies.

ISSUES, STANDARDS OF REVIEW AND PRESERVATION

1. Must the equity skimming count be reversed for lack of district court jurisdiction because the evidence and elements instruction reflect that Marshall was charged and convicted for a transaction different from the transaction relied on by the magistrate in binding the case over after the preliminary hearing?

It appears that courts address whether defendants were convicted of offenses other than those bound over from preliminary hearings without deference to the trial courts. See, e.g., State v. Ortega, 751 P.2d 1138 (1988) (conviction reversed because defendant was tried for offense other than he was bound over on, without

any apparent deference).

Trial counsel preserved this issue to some extent in the alternative motion for judgment notwithstanding the verdict or for a new trial (R. 184-88), which the trial court denied on the merits (T. 10/21/2003).[1] See, State v. Casey, 2001 UT App 205, ¶ 6 n.2, 29 P.3d 25 (motion for a new trial preserves an issue if the trial court rules on the merits), aff'd 2003 UT 55, 82 P.3d 1106.

Appellate counsel also raised the issue to an extent in seeking a certificate of probable cause, before counsel had reviewed the entire record or become thoroughly familiar with the case (R. 291 at 18, 24-25). However, as this Court has recognized, issues must be raised prior to a petition for a certificate of probable cause to be preserved. See, State v. Brown, 856 P.2d 358, 362-63 (Utah App. 1993).

The trial court raised a variant of this issue *sua sponte*, and relied on it, in granting the certificate of probable cause (R. 255-256, 261-263; R. 291 at 18-19, 27-29).

Lack of subject matter jurisdiction cannot be waived in any event. See, e.g., Barton v. Barton, 2001 UT App 199, ¶ 12, 29 P.3d 13.

Assuming *arguendo* that the issue was not fully preserved in the trial court,

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[1]The transcript of the hearing on the motion was not transcribed as of the date this brief was filed. Counsel for Marshall has ordered the transcript and designated it as part of the record, and includes in footnote 4 of this brief a summary of the trial court's ruling obtained from review of the videotape of the hearing. Once the transcript is available, counsel will forward copies of the trial court's ruling to the Court clerk and to counsel for the State.

Marshall relies on the ineffective assistance of counsel, plain error, and exceptional circumstances doctrines in seeking relief on appeal.

2. Does prosecutorial misconduct require reversal?

This Court reviews claims of prosecutorial misconduct under an abuse of discretion standard, and will reverse of the prosecutor's conduct or remarks called the jury's attention to improper matters in circumstances indicating a reasonable likelihood of a more favorable result absent the misconduct. See, State v. Kohl, 2000 UT 35, ¶ 22, 999 P.2d 7.

This issue was not preserved in the trial court, and Marshall relies on the plain error and ineffective assistance of counsel doctrines in seeking relief on appeal.

3. Does ineffective assistance by trial counsel require reversal?

Appellate counsel raised this issue in limited fashion in seeking a certificate of probable cause, before he had reviewed the entire record or become fully familiar with the case (R. 240-44; R. 291 at 2-25).

This Court reviews claims of ineffective assistance of counsel for correctness. See, e.g., State v. Maestas, 1999 UT 32, ¶ 20, 984 P.2d 376.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE

The following constitutional provisions, statutes and rules pertain and are copied in the addendum: Constitution of Utah, Article I §§ 7, 10, 12 and 13; United States Constitution, Amendments VI and XIV, § 1; Utah Code Ann. §§ 41-1a-702, 41-1a-1310, 41-3-201, 41-1a-1310, 76-6-522, and 77-1-6; Utah Rule of Criminal

Procedure 7.

STATEMENT OF THE CASE

NATURE OF THE CASE, COURSE OF PROCEEDINGS AND DISPOSITION

The State charged Marshall in case number 03180019FS with one count of equity skimming, a third degree felony, in violation of Utah Code Ann. § 76-6-522, as a result of a used car transaction between Marshall, the salesman, and Abplanalp, the customer, on July 19, 2002 (R. 1-7).

In case number 0318000313, the State charged Marshall with four counts of acting in capacity without license when required, a class A misdemeanor, in violation of Utah Code Ann. § 41-3-201 (R. 247-49).

Trial counsel, Cindy Barton-Coombs, moved to join the felony and misdemeanor cases, and waived a preliminary hearing on the misdemeanor counts (R. 132 at 3-4).

At the preliminary hearing, the State notified the magistrate, Judge Payne, that the State was not relying on the July 19 transaction with Abplanalp to prove the equity skimming count. Rather, the State contended that the crime of equity skimming occurred when Marshall sold Ablanalp's Monte Carlo to different customers, the Fausetts, on July 30, eleven days after the transaction with Abplanalp, when Abplanalp still owed Mountain America Credit Union $3,500 on the Monte Carlo (R. 132 at 44-45).

The bindover order was expressly premised on the transaction with the

Fausetts (R. 132 at 44-45).

No amended information was filed.

At the jury trial presided over by Judge Payne, the prosecutor argued at the outset and in closing that Marshall was guilty of equity skimming for selling Abplanalp's Monte Carlo to the Fausetts on July 30, when Marshall knew that there was still money owed to Mountain America Credit Union on the Monte Carlo (R. 267 at 7; R. 268 at 274-277, 285-289).

However, the equity skimming elements instruction focused on July 19, the date of the transaction with Abplanalp (R. 167), as did much of the evidence (R. 267 at 56-114; R. 268 at 120-122, 150-269).

The jury convicted Marshall as charged (R. 140, 142, 144, 146, 148).

Trial counsel moved for judgment notwithstanding the verdict or for a new trial on the equity skimming count (R. 184-188). The State opposed the motion (R. 190-193)

The court denied the motion and sentenced Marshall to prison for a term of zero to five years, after Marshall opted for a prison sentence over a jail sentence. The court ordered this sentence to run concurrently with the six month jail sentences he imposed on the class A misdemeanor counts (R. 202-204, 247-249).

Trial counsel and appellate counsel filed timely notices of appeal (R. 206, 252).

Appellate counsel moved for a certificate of probable cause pending appeal (R. 233-245).

Judge Payne granted a certificate of probable cause, based on the fact that the jury convicted Marshall of equity skimming on July 19, when there was no proof of equity skimming on that date (R. 255-256, 261-263; R. 291 at 19, 29).

STATEMENT OF FACTS

Marshall's trial began with seven witnesses who attested to Marshall's having sold them a car when he was not licensed to do so, and who identified the contracts reflecting the sales and that Marshall was their salesperson (R. 267 at 15-17, 20-27, 29-31, 33-35, 36-39, 41, 43-50, 52-55).

The remainder of the trial focused on the felony count of equity skimming.

On July 19, 2002, Chade Abplanalp went to the Mountain States Motors used car lot in Vernal, Utah (R. 267 at 57). Dustin Marshall, the Appellant, sold Mr. Abplanalp a 1999 Chevrolet S-10 pickup truck for $14,990 (R. 267 at 58, 69). Marshall and Abplanalp agreed that Abplanalp would trade in his 1996 Chevy Monte Carlo, and thereby get a $5,000 credit toward the purchase price of the S-10, and Ablanalp borrowed $10,000 of the remaining the purchase price on the S-10 from Mountain America Credit Union (R. 267 at 58, 72, 74). Abplanalp had to borrow $918.35 from the Mountain States Motors to cover taxes and fees, and said he signed a title release for the Monte Carlo, which included his bank account number and identified the Monte Carlo, when Marshall presented the release to him (R. 267 at 75).

At the time that Abplanalp traded in the Monte Carlo, Mountain America Credit

Union had a security interest in that car in the approximate amount of $3,500 (R. 267 at 59). Abplanalp testified at trial that he informed Marshall of the $3,500 balance he owed on the Monte Carlo during the negotiations on the S-10, and that Marshall "basically" told him that the $3,500 balance was no problem (R. 267 at 60-61). He assumed that Mountain States would pay off the balance owed on the Monte Carlo, because this was "common sense" to him (R. 267 at 62-63, 67). He did not attempt to clarify who would pay off the $3,500 on the Monte Carlo (R. 267 at 63).

Abplanalp was nineteen at the time of the sale, and his understanding of how things worked was based on watching his parents' past transactions, wherein he never saw the paperwork (R. 267 at 67-68, R. 268 at 261). He did not trade in a car when he bought the Monte Carlo (R. 267 at 67-68).

The sales contract Abplanalp signed reflected that there was no balance owing on the Monte Carlo (R. 267 at 63, 73). Abplanalp testified that he asked Marshall about this, and that Marshall told him that this was because Mountain States was responsible to pay off the balance on the Monte Carlo (R. 267 at 63-64). Abplanalp said he could not recall exactly what Marshall told him about that line on the contract, but said that he would not have bought the S-10 if he had understood that he were responsible to pay off the Monte Carlo, because he could not afford to do that and pay for the S-10 (R. 267 at 64).

Trial counsel presented a blank "authorization for payoff" form (Plaintiff's Exhibit 6), and then led Abplanalp to testify this was the title release form he referred

to, which he signed for Marshall, and which required Mountain States to pay off the loan (R. 267 at 76, 78-80).

Trial counsel did not cross-examine Abplanalp with his prior testimony under oath at the preliminary hearing that he and Marshall did not discuss who would pay off the loan, that Abplanalp did not sign any papers with regard to that issue during the transaction, and that Abplanalp only assumed that Mountain States would pay off the Monte Carlo (R. 132 at 9-10, 12-14, 19).

Abplanalp testified that he assumed that Mountain States would pay Mountain America the $3,500 balance, until he brought the $10,000 check toward the purchase of the S-10 to Mountain States on July 23rd (R. 267 at 61-62). In contrast, Abplanalp testified that when he called Mountain States about a month after buying the S-10 to check on the new license plates, Marshall said that Abplanalp was responsible to pay off the Monte Carlo, and that Mountain States needed him to do so in order to obtain the title to the Monte Carlo, which they had sold to different customers (R. 267 at 65).

Abplanalp's mother testified that after her son got a notice of late payment on the Monte Carlo, she talked to Marshall on the phone, and he told her that the Monte Carlo's title was supposed to have been free and clear, that he knew there was a lien on it, and that he thought it had been paid off (R. 267 at 85, 91). She said this conversation transpired a few days before her son was to get his license plates for the S-10 (R. 267 at 86).

Mountain America Credit Union loan officer Shelly Sorenson testified that when

Abplanalp applied for the loan on the S-10 on July 23rd, he told her he was trading in the Monte Carlo, but that they had no discussions regarding who would pay off the balance on the Monte Carlo (R. 267 at 94, 108; R. 268 at 121).

She testified that Abplanalp came in a couple of weeks later, at the end of July or first part of August, and said that he needed the title to the Monte Carlo, and that Mountain States had told him that he was responsible to pay it off (R. 267 at 94, 101). She said she told him she could not release the title until the balance had been paid, and that he needed to go work out who would pay off the balance (R. 267 at 95).

Sorenson never saw an authorization for pay off form supposedly signed by Abplanalp for Mountain States to pay off the Monte Carlo, but testified that such forms are normally not brought to the credit union (R. 267 at 102).

She testified that when dealerships agree to pay off liens, this is normally noted in the sales contracts (R. 267 at 105).

Marshall called Sorenson after she talked to Abplanalp, and said that he had sold the Monte Carlo and needed the title to it, and in about the second week of August, he also brought in the sales contract on the S-10, trying to get the title to the Monte Carlo, but she told him on both occasions that she could not release the title until they worked out who would pay the balance on the Monte Carlo (R. 267 at 95-96).

She testified that Abplanalp did not qualify for the amount of money it would cost to pay off the Monte Carlo and to pay off the S-10, but she did not make clear

whether he applied to get a loan for both (R. 267 at 109).

She testified without any objection or challenge from trial counsel that dealerships normally pay off balances on cars that are traded in, and that this norm is what led her to assume that Mountain States would be paying off the Monte Carlo (R. 267 at 111).

Jamie Fausett bought the Monte Carlo from Mountain States Motors on July 30, 2002, after Niles Sprouse let her test drive it, and after Marshall gave her details about the car over the phone (R. 268 at 122). Her husband negotiated the deal with Niles Sprouse, and Marshall signed the contract listing Marshall as the salesperson after Sprouse told him to do so (R. 268 at 124-25, 133).

The Fausetts did not learn of the lien on the Monte Carlo until Jamie Fausett called to inquire about the license plates, and Niles Sprouse came to their house on August 22nd, and explained that the lien precluded him from obtaining the title, and required them to return the car to him until the matter could be resolved (R. 268 at 126). Luke Fausett testified that Niles Sprouse told them that the previous owner of the Monte Carlo had indicated that nothing was owed on the car when it was traded in, when in fact, there was something owed on the car (R. 268 at 137).

Trial counsel called Niles Sprouse, the manager of Mountain States, to again establish that Mr. Marshall was a salesperson at their licensed used car dealership (R. 268 at 141).

Niles testified that his father, Leon Sprouse, set the terms of the Abplanalp S-

10 sale, which were that the S-10 would sell for $14,900, and that Abplanalp would receive a $5,000 trade-in on the Monte Carlo (R. 268 at 142-44).

At the time of the deal, Niles Sprouse was not aware that Abplanalp owed a balance on the Monte Carlo (R. 268 at 144). If that was not a term in the contract, it was not part of the deal (R. 268 at 154). When the dealership agreed to pay off balances on trade-in cars, they used an authorization for payoff form listing the balance due and the account number and the bank (R. 268 at 156). Banks will not talk to dealerships without this information, and completing this form is one of the first steps in such negotiations (R. 268 at 157).

Trial counsel established that similar information is required and put on a form if the customer is going to pay off the balance on a trade-in car (R. 268 at 157-58). Then Niles Sprouse clarified that if the customer is going to pay off the balance, the dealership just expects the title (R. 268 at 157). Then he testified that there would be paperwork detailing the information on the pay off if the dealership wanted to verify the payoff amount the customer was going to make (R. 268 at 158, 174). Then he testified that if a customer agreed to pay off a loan balance, the sales contract would reflect that nothing was owing on the trade-in car (R. 268 at 159). He explained that on the sales contract, when the dealership is going to pay off a balance, the contract indicates the balance owed, and who verified the amount owed (R. 268 at 168).

On Abplanalp's contract, the balance on the trade-in car was zero, and the contract then indicated,

> Purchaser warrants that he or she has given seller a true payoff amount on any vehicle traded in, and that if it is not correct and is greater than the amount shown above, purchaser will pay the excess to seller on demand.

(R. 268 at 168; Plaintiff's Exhibit 3). The back of the contract indicated that the trade-in was free of any encumbrances unless noted on the front of the contract, and indicated that the purchaser of the new car agreed to produce the title for the trade-in (R. 268 at 171; Defendant's Exhibit 8).

As the manager of Mountain States, he had no information indicating that the dealership was obligated to pay off the Monte Carlo (R. 268 at 172).

About a week after the transaction, Niles, Marshall and a secretary began working to find out why they had not yet received the title to the car, and found out that there was still money owed on the Monte Carlo (R. 268 at 147-48).

Niles Sprouse testified that he sold the car to the Fausetts a few days later, hoping and expecting to get the title (R. 268 at 148). Then he explained that they discovered the lien after the had sold the car to the Fausetts, when they were trying to get them the title (R. 268 at 149). Niles testified that they did not know there was a problem with the title when they sold the Fausetts the car, but conceded that he did not know if Marshall knew there was a problem when they sold the Fausetts the car (R. 268 at 155).

Marshall was listed as the salesperson on the sale of Abplanalp's Monte Carlo to the Fausetts, and would have received a commission, but the deal did not go

through, so he did not get the commission (R. 268 at 153).

Trial counsel called Leon Sprouse to testify that he finalizes all purchases and deals at Mountain States Motors (R. 268 at 177). No one at Mountain States was authorized to make side or unwritten deals (R. 268 at 187-88).

Trial counsel introduced the invoice showing that he purchased the S-10 for $12,435 at an auction in Denver before Abplanalp bought it from the dealership, including transportation charges of $250 (R. 268 at 178-79, 185). This invoice reflects mileage of 32,045 (Plaintiff's Exhibit 10). There were additional dealership expenses for the S-10 before Abplanalp bought it (R. 268 at 180). Based on mileage and other factors, the NADA value of the S-10 would have been $14, 225 (R. 268 at 181-183).

The mileage on the Monte Carlo was around 91,000 miles, and he estimated the value of the Monte Carlo to be around $3,300 (R. 268 at 184). The low National Automobile Dealers Association value was $4,300, which reflected a $775 deduction for the mileage (R. 268 at 189, 212).

He set the price of $14,990 on the S-10, and approved a $5,000 trade-in on the Monte Carlo because he wanted to make the deal (R. 268 at 184-85). When Abplanalp brought in a check for the S-10, Niles called Leon, and Leon Sprouse agreed to carry a note for the outstanding balance on the S-10, which was around $900 (R. 268 at 185).

About ten days after the deal on the S-10, they sold the Monte Carlo to the Fausetts (R. 268 at 187).

It was about three weeks after the deal on the S-10 was made that Niles called and told him that Mountain America would not release the title to the Monte Carlo because it had not been paid off (R. 268 at 186).

Leon Sprouse personally filed a complaint with the sheriff's office regarding Abplanalp's failure to produce the title within forty-eight hours, as the law required him to do (R. 268 at 191). Mountain States never considered or agreed to pay off Mountain America, and this was based on the sales contract (R. 268 at 191-92).

On cross-examination, the prosecutor established that the S-10 was hauled to Vernal from Denver, and that Leon Sprouse's wife drove the S-10 at least 350 miles, from Vernal to Neola and back, and to Salt Lake City and back, and around town (R. 268 at 194-96). The title from the sale of the S-10 to Ablanalp reflected the same mileage as the invoice from the Denver auction – 32,045 (R. 268 at 197-198). The odometer disclosure statement reflected mileage of 32,050, reflecting that the car had only been driven five miles since it was purchased in Denver (R. 268 at 199).

Leon testified that he is always absolutely and positively fair with his customers, and denied that they ever committed odometer fraud (R. 268 at 199). The trial court overruled trial counsel's relevance objections, noting that she went into the title and mileage on direct (R. 268 at 197, 202).

Dustin Marshall testified that he worked as a salesman for Mountain States when he was not licensed, and that eight years before trial, he was convicted of felony theft by deception (R. 268 at 208-09). He had applied for a license in July, but

did not obtain one until September, and did not understand how critical the license was to have (R. 268 at 210). He conceded that he knew he should have had a license, and sold cars without one nonetheless (R. 268 at 230-232).

Abplanalp and his friend, Hardy, came in and test-drove cars on July 13th or 14th, and Abplanalp chose the S-10 (R. 268 at 210-211). Leon Sprouse approved of a deal wherein Abplanalp would get $5,000 trade-in credit for the Monte Carlo toward the purchase prices of $14,900 (R. 268 at 213-14). Abplanalp told Marshall that he owed on the Monte Carlo, but did not know the balance (R. 268 at 214). Marshall asked him if he wanted to finance the deal through Mountain States, and Abplanalp said he would finance the deal through Mountain America Credit Union (R. 268 at 214-15).

As is always his practice, Marshall told Abplanalp that he could not trade in something that he did not own, so he would need to borrow enough to pay off the Monte Carlo he was trading in, and the S-10 (R. 268 at 215). He explained Abplanalp's duty to pay off the Monte Carlo at least twice (R. 268 at 237). He did not have Abplanalp complete the pay off authorization forms that would have given the dealership access to the bank records on the Monte Carlo loan, because it was not the dealership's obligation to pay off the Monte Carlo (R. 268 at 235). This was when Abplanalp first came in, and then he left with a worksheet detailing the proposed sale (R. 268 at 216).

Marshall did not recall discussing with Abplanalp the portion of the contract

indicating that the balance on the Monte Carlo was zero, because that would have been redundant to what he had already told him about the Monte Carlo needing to come to the dealership free of any encumbrances (R. 268 at 247). He did review the specific terms of the contract, and Abplanalp had no questions regarding the contract (R. 268 at 247). Hardy was not present during the contract discussion (R. 268 at 248).

On July 19, Abplanalp called the dealership and told Marshall that he would bring a check for $10,000, and asked if the dealership would lend him the outstanding $918 (R. 268 at 216). Marshall asked him if the $10,000 check would be "net" to Mountain States, and Abplanalp did not seem to understand, so when Marshall then asked him if the check would be made payable to Mountain States, Ablanalp said it would be Mountain State's check, without further discussion of what "net" meant (R. 268 at 218).

Mr. Sprouse agreed to the $918 loan, provided that Abplanalp had a co-signer on the $918 loan (R. 268 at 217). Abplanalp said his friend, Hardy, would co-sign on the $918 loan, and Marshall had Abplanalp come to the dealership to get a contract for the loan finalization (R. 268 at 217-18).

Abplanalp called on July 23rd, and said he had a check and wanted to close the deal (R. 268 at 218). Abplanalp and Hardy came in and left the Monte Carlo and the check, signed the promissory note and other papers, and left with the S-10 (R. 268 at 219). Marshall did not verify that Abplanalp had paid off the Monte Carlo, and did

not have the forms giving him access to Abplanalp's private banking records (R. 268 at 237).

It was on the 7th or 8th of August that Marshall's tracking secretary, Michelle Mansfield, told him that the title was not in, and Marshall called Mountain America and was told that the issue would be researched (R. 268 at 219). He got a call back about an hour later, and learned that the title would not be released because of the lien (R. 268 at 220). He contacted Abplanalp by phone right away, and Ablanalp told him that he had taken care of it, and would go to Mountain America and get the title and bring it to Marshall (R. 268 at 220).

Sometime around August 12, Abplanalp and Hardy came in to the dealership, and Abplanalp told Marshall that he could not get the title because there was a lien and the credit union would not lend him any more money (R. 268 at 221). They discussed options, because it was Abplanalp's duty to clear the title (R. 268 at 221). Abplanalp asked the dealership to cover the pay off, and Marshall agreed to check with Leon Sprouse, but he never saw or heard from Abplanalp again after that (R. 268 at 222). Sprouse would not approve the additional loan, and Marshall could not contact or find Abplanalp (R. 268 at 222).

Several days later, Marshall went to the credit union and met with Shelly Sorenson, and tried to show her the contract, wherein Abplanalp had agreed to pay off the Monte Carlo (R. 268 at 225). He complained that the credit union had allowed Ablanalp to trade in a car he did not own, and thereby harmed the credibility of the

dealership (R. 268 at 226). He told her the problem would not have arisen if Mountain States had done the financing, explaining to the jury that Mountain States would either have made arrangements for an adequate loan to cover the S-10 and Monte Carlo balances, or refused to sell Abplanalp the S-10 if he did not qualify for an adequate loan (R. 268 at 242-43).

At the time of the sale of the Monte Carlo to the Fausetts on July 30th, Marshall was not aware of the problem with the title, which problem came to his attention on August 7th or 8th (R. 268 at 223-224).

Trial counsel called Michelle Mansfield, secretary at Mountain States, who testified that she was ten feet away when Abplanalp and his friend were trying to negotiate the sale of the S-10, and when Abplanalp talked about getting his own financing on the S-10 (R. 268 at 249-250). She testified that all cars purchased by Mountain States come with odometer statements reflecting their mileage at the time Mountain States acquires them, and that the computer prints odometer statements at the time of the sale of the cars to customers which reflect the mileage noted by the company mechanics when the cars first come to Mountain States, and do not reflect the additional mileage which may be incurred in test-drives and usage after Mountain States takes possession of the cars (R. 268 at 252-53). The odometer statements read as though they reflect the mileage of the cars when they leave Mountain States with the customers (R. 268 at 256).

Trial counsel called Chade Abplanalp and led him to testify that Marshall told

Abplanalp that Marshall would take care of the lien on the Monte Carlo, and that he believed that Mountain States would pay off the lien and get the title, based on what Marshall told him (R. 268 at 258-59). Abplanalp testified that it would surprise him if his Mountain States file did not contain an authorization for payoff form, and trial counsel tried to present him with his file to show that there was none, but the trial court sustained the prosecutor's objection to lack of foundation (R. 268 at 262). Trial counsel never presented any foundation or witness to establish that the file, which lacked the form, was complete. Abplanalp testified that Marshall gave him the payoff authorization form, and that he put his bank account and Monte Carlo on it and gave it to Marshall (R. 268 at 263).

Trial counsel led Abplanalp to testify that he signed the odometer statements for the Monte Carlo and the S-10, and that the odometer statement for the S-10 was accurate (R. 268 at 263-64).

Abplanalp disputed Marshall's testimony that they talked on the phone, and said that he did not own a phone at the time, although he acknowledged that he could have been reached at his mother's, but was never there (R. 268 at 264, 267). He had testified earlier that it was when he called Mountain States about a month after buying the S-10 to check on the new license plates, Marshall said that Abplanalp was responsible to pay off the Monte Carlo, and that Mountain States needed him to do so in order to obtain the title to the Monte Carlo, which they had sold to different customers (R. 267 at 65).

He reiterated that Marshall told him that the sales contract reflected a zero balance on the Monte Carlo to reflect that Abplanalp was not responsible for the balance (R. 268 at 265).

He testified that when he called Marshall and told him the credit union would only loan him $10,000 and "no more," Abplanalp was not aware of the additional $918 he needed to get the truck, and only learned of that amount when he got to the dealership with the $10,000 check (R. 268 at 265). In contrast, he testified that he called Marshall to tell him the Mountain America would "only" lend him $10,000 (R. 268 at 267), and Shelly Sorenson had earlier testified that his original loan application was for $10,916 (R. 267 at 109).

Summary of Arguments

Because Marshall was tried and convicted for equity skimming on the basis of his transaction with Abplanalp on July 19, when he was bound over by the committing magistrate on that offense on the basis of his transaction with the Fausetts on July 30, the district court had no jurisdiction over the offense of conviction.

Reversal of the equity skimming conviction is thus required.

The prosecutor's repeated and significant mis-characterizations of the evidence during closing argument require reversal.

Repeated instances of ineffective assistance by trial counsel, involving the damaging motion to join the misdemeanor and felony counts, the introduction of and failure to counter significant harmful evidence against Marshall, and the failure to

assert Marshall's rights and helpful law, prejudiced the jury's verdict on the equity skimming count.

Individually and cumulatively, the errors require reversal.[2]

Arguments

I.
REVERSAL OF THE EQUITY SKIMMING CONVICTION IS REQUIRED BECAUSE THE VERDICT WAS PREMISED ON A TRANSACTION THAT WAS NOT BOUND OVER AFTER THE PRELIMINARY HEARING.

A. RELEVANT FACTS

The State charged Marshall in case number 03180019FS with one count of equity skimming, a third degree felony, in violation of Utah Code Ann. § 76-6-522, as a result of a used car transaction between Marshall, the salesman, and Abplanalp, the customer, on July 19, 2002 (R. 1-7).

At the preliminary hearing, the State notified the magistrate, Judge Payne, that the State was not relying on the July 19 transaction with Abplanalp to prove the equity skimming count. Rather, the State contended that the crime of equity skimming occurred when Mountain States Motors sold Ablanalp's Monte Carlo to different customers, the Fausetts, on July 30, eleven days after the transaction with Abplanalp (R. 132 at 44-45).

The bindover order was expressly premised on the transaction with the

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[2]This Court will reverse if the cumulative effect of multiple errors undermines the Court's confidence in the fairness of the trial. See, e.g., Whitehead v. American Motors Sales Corp., 801 P.2d 920, 928 (Utah 1990).

Fausetts (R. 132 at 44-45).

At the jury trial presided over by Judge Payne, the prosecutor argued at the outset and in closing that Marshall was guilty of equity skimming for selling Abplanalp's Monte Carlo to the Fausetts when Marshall knew that there was still money owed on the Monte Carlo (R. 267 at 7; R. 268 at 274-277, 285-289).

However, the equity skimming elements instruction focused on July 19, the date of the transaction with Abplanalp (R. 167),[3] as did much of the evidence (R. 267 at 56-114; R. 268 at 120-122, 150-269), and the information (R. 1-7).

The jury convicted Marshall as charged (R. 140, 142, 144, 146, 148).

Judge Payne denied the motion for a new trial or for judgment notwithstanding the verdict which raised the issue of the variance between the proof and the jury

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[3]Instruction Number 14 provided:

> Proof of the commission of the crime of Equity Skimming, requires proof beyond a reasonable doubt of each of the following elements:
> 1. That Dustin Marshall;
> 2. On or about July 19, 2002
> 3. Did as a dealer or broker;
> 4. Intentionally, knowingly or recklessly;
> a. Transferred or arranged the transfer of a vehicle for consideration or profit;
> 5. When he knew or should have known the vehicle was subject to a security interest;
> 6. Without first obtaining written authorization of the holder of the security interest.

(R. 167).

instruction,[4] but later granted a certificate of probable cause, based on the variance between the date charged and in the equity skimming elements instruction, and the State's proof (R. 255-256, 261-263; R. 291 at 19).

B. RELEVANT LAW

When there is a variance between the crime charged and the State's evidence which effects the accused's substantial rights, or which results in a miscarriage of justice, reversal is in order. See, e.g., State v. Marcum, 750 P.2d 599, 601-02 (Utah 1988). In the instant matter, the variance between the information and the elements instruction and the State's proof not only undermined Marshall's due process rights to notice of the charges, see id, but also resulted in a conviction that was void for lack of jurisdiction.

Article I §§ 12 and 13 of the Utah Constitution, Utah Code Ann. § 77-1-6(2)(e), and Utah R. Crim. P. 7 guarantee the accused's right to a preliminary hearing on the offense of conviction. See, e.g., id. See also, State v. Ortega, 751 P.2d 1138, 1139 (Utah 1988).

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[4]A review of the videotape of the trial court's ruling, which will be transcribed, included in the record on appeal, and forwarded to this Court and the State, reflects that the trial court acknowledged that the jury instruction listing July 19 as the date of the offense was erroneous and that this issue was his biggest concern of the issues raised, but reasoned that the date of the offense was not an element. He recognized that both parties condoned the jury instructions, and that the motion for a new trial or judgment notwithstanding the verdict was deficient in various respects, but ruled on the merits that he was convinced that based on the evidence and the arguments of the attorneys, the jury could not have convicted Marshall for the transaction with Abplanalp. Video at 11:13:00-11:30:15.

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, Article I §§ 7, 10 and 12 of the Utah Constitution, and Utah Code Ann. § 77-1-6(1)(f) protect the accused's right to a fair and impartial trial. See, id.[5]

These provisions of constitutional law provide related protections in this context, for preliminary hearings are essential to fair trials, because they allow the defendant to understand and discover the State's case, to discover and preserve favorable evidence, and to ferret out groundless prosecutions. See, generally, e.g., State v. Anderson, 612 P.2d 778, 783-84 (Utah 1980).

Utah has long recognized that a preliminary hearing is essential to a district court's jurisdiction over a felony.[6]

As detailed above, the information and elements instruction for equity skimming resulted in a verdict of conviction for equity skimming for July 19, for the transaction with Ablanalp, rather than a conviction for the July 30 transaction with the Fausetts,

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[5]See also, e.g., State v. Fulton, 742 P.2d 1208, cert. denied, 484 U.S. 1044 (1988) (state and federal due process decision); State v. Johnson, 475 P.2d 543 (Utah 1970) (decided under Article I § 10); State v. Kendrick, 538 P.2d 313 (Utah 1975) (decided under Article I § 12).

[6] See, e.g., State v. Freeman, 71 P.2d 196, 199 (Utah 1937) ("The right of the district court to try any one for a felony rests upon the filing in such court of a proper indictment by grand jury, or the filing of a proper information by the district attorney, or other proper counsel for the state. And such information can be filed properly, only after the accused has been duly bound over and held to answer in the district court by a magistrate having jurisdiction to investigate the charge and determine if there is probable cause to believe an offense has been committed and that defendant is guilty thereof."). See, also, State v. Jensen, 96 P. 1085 (Utah 1908) (defendant could not be tried for offense distinct from that upon which he had preliminary hearing).

which was the subject of the preliminary hearing and bindover order, and the only transaction the trial court had jurisdiction to try. See, e.g., Freeman, and Jensen, *supra*.

While the trial court initially indicated that he felt that the jury could not have convicted Marshall for the July 19 offense on the basis of the evidence and the arguments of counsel in denying the alternative motion for a new trial or for judgment notwithstanding the verdict , see n.4, *supra* (summarizing the ruling), in granting the certificate of probable cause, the trial court recognized that the government's proof at trial did not support a conviction for equity skimming on the date alleged in the elements instruction (T. 291 at 19). The revised ruling was correct, given that the information, elements instruction, and vast majority of the evidence focused on the transaction between Marshall and Abplanalp, see, Statement of Facts, *supra*, and given that the arguments of counsel do not control over the governing jury instructions. See, e.g., State v. Longshaw, 961 P.2d 925, 928-30 (Utah App. 1998) (reviewing numerous cases recognizing that jury instructions govern over the arguments of counsel regarding the law).

The parties and trial court did not recognize or address the jurisdictional problem caused by the fact that the conviction was for a transaction other than that which was bound over for trial.

Reference to various Utah cases, both old and new, confirms that the absence of jurisdiction over the offense of conviction requires reversal of the equity skimming

conviction. See, State v. Nelson, 176 P. 860 (Utah 1918); State v. Ortega, 751 P.2d 1138 (Utah 1988).

In Nelson, the court reversed a conviction for having carnal knowledge of a female between 13 and 18 years of age, because the defendant was bound over for an offense on July 13, but after the jury deadlocked on that offense, the government chose to retry him for a different offense with the same victim on July 15. 176 P.2d at 860.

In requiring the reversal, the court first quoted Article I § 13 of the Utah Constitution, and then applied the plain terms of that provision to hold that it had been violated in that case. Id. at 861. The court acknowledged the law generally recognizing that the specific date of a criminal offense is not a material element, but explained that the actual criminal transaction is always material. Id. at 861. The court explained that a drafter of a criminal information must have a specific criminal transaction in mind to support a charge, and that the transaction reflected in the charges must be the same as that proved at the preliminary hearing if the preliminary hearing is to fulfill its purposes of permitting the accused to discover and confront the State's accusations and prepare for trial. Id. The court reviewed several Utah cases supported its analysis, and then concluded by noting that reversal was required to insure that the defendant had a fair and impartial trial. Id. at 864.

More recently, in Ortega, the court reversed a conviction for sexual abuse of a child, because the offense of conviction was a separate criminal transaction from,

the offense proved at the preliminary hearing. See 751 P.2d at 1139-41. At the preliminary hearing, the victim described two separate offenses, one of which occurred under a bed on October 4, and one of which occurred on the defendant's lap on a different day. Id. at 1139. The magistrate bound over solely on the October 4 under-the-bed incident, but at trial, the defendant was convicted for the on-the-lap incident on October 4. Id.

The court on appeal required reversal because Utah law continues to recognize the vital requirement of a preliminary hearing on all felony charges to be tried in district court, and because the defendant was not bound over on the offense of conviction, and thus could not have had adequate notice of that charge after it was dismissed at the preliminary hearing. Id. at 1140-41.

As in Nelson, Ortega, and the cases discussed therein, this Court should reverse the equity skimming conviction, because Marshall was charged with and convicted of equity skimming on the basis of the transaction with Abplanalp on July 19, in the absence of evidence or jurisdiction. Because the preliminary hearing magistrate bound the case over on the basis of the July 30 transaction with the Fausetts, that was the only offense the district court had jurisdiction over, and the conviction for the July 19 transaction with Abplanalp cannot stand. See, id.

C. PRESERVATION

Trial counsel raised this issue to some extent in the alternative motion for a new trial or for judgment notwithstanding the verdict (R.184-88), which the trial court

denied on the merits (R. 202-204; ruling summarized at n.4, *supra*). This preserved the issue to some extent.[7] Appellate counsel also addressed the issue to some extent when the trial court raised it at the hearing on the certificate of probable cause (R. 291 at 19-20, 24-25), although by then, the time to preserve the issue had passed.[8]

Lack of subject matter jurisdiction cannot be waived in any event. See, e.g., Barton v. Barton, 2001 UT App 199, ¶ 12, 29 P.3d 13.

Assuming *arguendo* that the issue must be but is not fully preserved, this Court should reach the issue under the exceptional circumstances, plain error, and ineffective assistance of counsel doctrines.

Courts utilize the extraordinary circumstances doctrine in cases involving "'rare procedural anomalies,'" as a "'safety device'" to avoid manifest injustice. State v. Nelson-Waggoner, 2004 UT 29, ¶ 23, 497 Utah Adv. Rep. 23.

Given that Marshall did not receive a fair trial before a court with subject matter jurisdiction because he was deprived of a preliminary hearing and bindover on the offense of conviction, this Court should correct this rare and significant procedural anomaly in this case. See, id.

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[7]See, State v. Casey, 2001 UT App 205, ¶ 6 n.2, 29 P.3d 25 (motion for a new trial preserves an issue if the trial court rules on the merits), aff'd 2003 UT 55, 82 P.3d 1106.

[8] See, e.g., State v. Brown, 856 P.2d 358, 362-63 (Utah App. 1993) (petition for certificate of probable cause does not preserve issues for appeal, because jurisdiction has passed to the appellate court at that stage).

The plain error doctrine requires a showing that an obvious and harmful error occurred which prejudiced the defendant's substantial rights, although the obviousness prong may be relaxed when a highly prejudicial error occurred which is more obvious in hindsight than it likely was before the trial court. See, e.g., State v. Eldredge, 773 P.2d 29, 35 and n.8 (Utah), cert. denied, 493 U.S. 814 (1989). Constitutional errors are particularly appropriate for correction under the plain error doctrine. See, e.g., United States v. Lindsay, 184 F.3d 1138, 1140 (10th Cir.), cert. denied, 145 L.Ed.2d 343 (1999).

The constitutional law requiring preliminary hearings to establish district court jurisdiction over felonies, and requiring preliminary hearings as prerequisite to all fair criminal trials, was in effect for years before this trial, and the fact that this error by nature precluded a fair trial establishes prejudice. See, e.g., Nelson and Ortega, *supra*.

To the degree that evidentiary prejudice must be shown, a review of the evidence confirms that the State's case on the equity skimming count, which hinged on whether or not Marshall should have known that the Monte Carlo title was not clear on July 30, was far less than compelling.

The contract Abplanalp signed on July 19 clearly required him to pay off the Monte Carlo (Exhibits 3 and 8), and the evidence never supported Abplanalp's claim that Marshall misled him to believe that the dealership would pay off the Monte Carlo, because it did not explain why Marshall would have had a motive to do this, given that

the Monte Carlo was useless to the dealership without clear title, and that the S-10 was worth some $15,000, and Abplanalp only paid $10,000 and traded in the Monte Carlo, which was worth between $3,300 and $4,300 (R. 268 at 184, 189, 202) to get the S-10.

Abplanalp himself was less than credible, because he made inconsistent statements regarding when he supposedly learned he was supposed to pay off the Monte Carlo.[9] He also made inconsistent statements regarding whether he knew from the outset that he needed to borrow $10, 918.35 when he applied for the loan in that amount (R. 267 at 109; R. 268 at 267), or whether he only learned of the $918.35 after bringing the check for $10,000 to the dealership (R. 268 at 265). He also made inconsistent statements regarding whether he ever talked to Marshall on the telephone.[10]

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[9] Abplanalp testified that he assumed that Mountain States would pay Mountain America the $3,500 balance, until he brought the $10,000 check toward the purchase of the S-10 to Mountain States on July 23rd (R. 267 at 61-62). In contrast, Abplanalp testified that when he called Mountain States about a month after buying the S-10 to check on the new license plates, Marshall said that Abplanalp was responsible to pay off the Monte Carlo, and that Mountain States needed him to do so in order to obtain the title to the Monte Carlo, which they had sold to different customers (R. 267 at 65).

[10]He disputed Marshall's testimony that they talked on the phone, and said that he did not own a phone at the time, although he acknowledged that he could have been reached at his mother's, but was never there (R. 268 at 264, 267). He had testified earlier that it was when he called Mountain States about a month after buying the S-10 to check on the new license plates, Marshall said that Abplanalp was responsible to pay off the Monte Carlo, and that Mountain States needed him to do so in order to obtain the title to the Monte Carlo, which they had sold to different customers (R. 267 at 65). He also testified that he called

His lack of credibility substantially undermined the State's case, and confirms the prejudice to Marshall from the confused manner in which the State's case was presented to the jury and charged in the elements instruction.

The trial court essentially recognized the plain and prejudicial nature of the error involved in the variance when he granted the certificate of probable cause on the basis of the error. Thus, the Court should grant relief under the plain error doctrine. See, Eldredge, *supra*.

To demonstrate ineffective assistance of counsel, Marshall must demonstrate that trial counsel's performance fell below objectively reasonable standards of representation, and that this objectively deficient performance was prejudicial. See e.g. Parsons v. Barnes, 871 P.2d 516, 521 (Utah), cert. denied 513 U.S. 966 (1994).

One of the most basic duties of a trial lawyer is to properly raise and preserve all issues in the lower court. See, e.g., State v. Smedley, 2003 UT App 79 at ¶ 10, 67 P.3d 1005. When a defense lawyer fails to assert beneficial law and seek accurate jury instructions based on the current law, this constitutes objectively deficient performance, which will not be excused by this Court with hypothetical tactical bases. See, State v. Moritzsky, 771 P.2d 688, 692 (Utah App. 1989) (trial counsel's failure to seek jury instruction reflecting current law beneficial to the client was objectively deficient oversight of the law, which could not conceivably have been

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Marshall to tell him the Mountain America would "only" lend him $10,000 (R. 268 at 267).

valid trial strategy).

Just as the trial court should have known and applied the law requiring criminal trials to be premised on preliminary hearings on offenses of conviction, trial counsel should have known and asserted the same law. See, e.g., Nelson and Ortega.

Because her objectively deficient performance foreclosed the fairness of the trial and permitted her client to be tried and convicted in the absence of subject matter jurisdiction, in a case wherein the government's proof was fundamentally wanting, the deficient performance was prejudicial and requires reversal. See, e.g., id.

II.
PROSECUTORIAL MISCONDUCT REQUIRES REVERSAL.

A. RELEVANT FACTS

1. The Credit Union Employee's Supposed Dismissal of Abplanalp's Contractual Obligation to Make the Pay Off

In closing argument, the prosecutor emphasized Shelly Sorenson's testimony that she assumed that Mountain States would pay off the Monte Carlo, and then he claimed that when Shelly Sorenson was examined about the part of Abplanalp's contract showing that he was responsible for paying off the Monte Carlo, she testified that the credit union does "not pay any attention to that part of the contract, because different car dealers do it differently and they negotiate it differently." (R. 268 at 275). He reiterated this claim in his rebuttal closing argument, stating,

> Let me tell you another some other reasons I think you need to believe Chade's story about this. Shelly Sorenson, she deals with these contracts. She testified quite a bit. You know how much attention she paid to line 11 and the payoff amount on this contract of sale, Exhibit No. 3. Remember what she said? Zero.
>
> It didn't matter, because the dealership makes other representations. Mr. Sprouse testified that they were going to give him a $5,000 trade in on a car that was only worth $3,300 to him. He said, "Well, that's just how you make the deal."
>
> In other words, he's willing to represent something completely different than what's really reality to make the deal, and that's why Shelly Sorenson says, "We don't pay any attention to that line," because the defendant represented that he was - that Mountain States was going to pay off the loan to Mountain America Credit Union.

(R. 268 at 286-87).

Actually, Shelly Sorenson testified that most of the time, it is specified in the contracts when dealerships are going to make payoffs (R. 267 at 105). She was never asked about the part of Abplanalp's contract reflecting that he was to pay off the Monte Carlo, and testified that the credit union employees do not normally worry about contracts that do not specify who will make payoffs, because "it's all part of the deal that they've worked out with the dealer." (R. 267 at 106). She did not testify that the credit union employees pay no attention to the line in the contract reflecting credit union balances on trade in cars because the contracts normally do not accurately reflect the agreements between dealerships and buyers, or that they did so in this case this because Marshall represented that he would pay off the balance (R. 268 at 287).

2. Marshall's Supposed Ploy To Finance the Deal

The prosecutor also argued, without any evidentiary support, that Marshall told Abplanalp, "'It would be better if you can finance through Mountain States,'" and then argued that the jurors could "almost" infer that Marshall was trying to hide the transaction by having Mountain States handle the financing (R. 268 at 277).

While there was testimony that Marshall asked Abplanalp if he wanted to finance through Mountain States (R. 268 at 214-15), there was never any testimony that Marshall tried to persuade him to do so. Nor was there any logic to the prosecutor's misstatement of the evidence, because even if Mountain States had financed the deal, until they or Abplanalp paid off the Monte Carlo, Mountain States could not obtain the title to that car.

3. Marshall's Supposed Exclusive Reliance on Ablanalp's Word Regarding the Pay Off

At the end of his rebuttal closing argument, the prosecutor argued:

> Let me just say one other thing. As you consider which testimony to believe and which of Chade or Mr. Marshall, you know, Mr. Marshall sat up here on the witness stand and testified, "You know, I just trusted him that he would get the title. I had his word. I had his word that he would pay of the $3,300 to $3,600 to Mountain America and just give me the title. I had his word."
>
> So why didn't he rely on his word for the $918.35? He entered a contract that had to be cosigned for $918.35, but he'll take his word that he's going to pay off the title for $4,400 to $3,600. The reality of the fact is and what is really happening is what Mountain States agreed to was not what Mr. Marshall agreed to.
>
> Mr. Marshall represented to Mr. Abplanalp that he was going to pay off Mountain America.

(R. 268 at 288-89).

While Marshall did testify that the dealership ordinarily had the right to rely on their customer's word and did testify that Abplanalp said he would pay off the Monte Carlo and that he had no reason to doubt Abplanalp at that time (R. 268 at 236, 238), Marshall did not testify that he was relying on Abplanalp's word that he would pay off the Monte Carlo. As was true of the contract he obtained for the $918.35, Marshall repeatedly testified to relying on the signed contract reflecting that Abplanalp would pay off the Monte Carlo (R. 268 at 233, 235, 240, 242, 243).

B. RELEVANT LAW

Utah law has long recognized that a criminal trial is supposed to be a search for the truth, rather than a mere contest between the defense and prosecution.[11] In State v. Thomas, 244 P.2d 653 (Utah 1952), the court quoted what it characterized as a

> good statement as to the proper decorum of a prosecutor . . . contained in Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633, 79 L. Ed. 1314, 1321:
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> [A prosecutor is]
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> "* * * in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor * * * But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Thomas at 656 (citation omitted).

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[11]See, e.g., State v. Hay, 859 P.2d 1, 7 (Utah 1993); State v. Carter, 707 P.2d 656, 662 (Utah 1985); State v. Jarrell, 608 P.2d 218, 224 (Utah 1980).

If a prosecutor's comments taint the fundamental fairness of the proceedings, the arguments violate a defendant's right to due process of law. See, e.g., Darden v. Wainwright, 477 U.S. 168, 181 (1986).[12] Claims of prosecutorial misconduct require a fact-specific inquiry which is guided by the defendant's constitutional rights to a fair trial.[13]

In Utah, the general test for prosecutorial misconduct is set forth in State v. Troy, 688 P.2d 483 (Utah 1984), as follows:

> "The test of whether the remarks made by counsel are so objectionable as to merit a reversal in a criminal case is, did the remarks call to the attention of the jurors matters which they would not be justified in considering in determining their verdict, and were they, under the circumstances of the particular case, probably influenced by those remarks."

Id. at 486 (citation omitted). Arguing matters unsupported by evidence violates Troy.

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[12]Article I §§ 7 and 12 of the Utah Constitution provide due process of law and the right to a fair trial, as does Utah Code Ann. § 77-1-6. Article I § 7, the due process provision, has been interpreted as requiring exclusion of unreliable evidence which is likely to be unduly impressive to jurors, see State v. Ramirez, 817 P.2d 774 (Utah 1991), and as requiring an inquiry into the merits of the case to be adjudicated, see generally Christiansen v. Harris, 163 P.2d 314, 317 (Utah 1945). Article I § 12 provides the general procedural and substantive rights of criminal defendants to insure the fundamental fairness of criminal proceedings. See, generally, State v. Anderson, 612 P.2d 778 (Utah 1980). When a prosecutor's arguments draw the jurors' attention away from the merits of the case, and call into question the reliability and fairness of the proceedings and verdict or sentence, these provisions are implicated.

[13]See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 240 (1940)("Of course, appeals to passion and prejudice may so poison the minds of the jurors even in a strong case that an accused may be deprived of a fair trial. ... [E]ach case necessarily turns on its own facts.").

Id.

The Troy Court persuasively explained the prejudice analysis further,

> Step two is more difficult and involves a consideration of the circumstances of the case as a whole. In making such a consideration, it is appropriate to look at the evidence of defendant's guilt.
>
> "If proof of defendant's guilt is strong, the challenged conduct or remark will not be presumed prejudicial." Likewise, in a case with less compelling proof, this Court will more closely scrutinize the conduct. If the conclusion of the jurors is based on their weighing conflicting evidence or evidence susceptible of differing interpretations, there is a greater likelihood that they will be improperly influenced through remarks of counsel. Indeed, in such cases, the jurors may be searching for guidance in weighing and interpreting the evidence. They may be especially susceptible to influence, and a small degree of influence may be sufficient to affect the verdict. Counsel is obligated in such cases to avoid, as far as possible, any reference to those matters the jury is not justified in considering.

Id. at 486-87 (citation omitted).

It is the State's burden to show that prosecutorial misconduct was harmless beyond a reasonable doubt. State v. Tarafa, 720 P.2d 1368, 1373 and n.21 (Utah 1986). All reasonable doubts are to be resolved in favor of the defendant. State v. Eaton, 569 P.2d 1114, 1116 (Utah 1977).[14]

Troy provides an example of reversible error for prosecutorial misconduct. There, the court found that the prosecutor's repeated improper comments required a new trial on an arson charge, because the State's evidence less than compelling

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[14]More recent opinions from the Utah Supreme Court have stated differing standards. See, e.g., State v. Hay, 859 P.2d 1, 7 (Utah 1993)(a defendant must show that the results would likely have been more favorable in the absence of the misconduct).

on these facts:

> Shortly past noon on July 22, 1980, a vacant house in Salt Lake County exploded and burned. The house was owned by defendant and his exwife and was under court order to be sold, with the equity to be divided 65 percent to her and 35 percent to him. Until the house was sold, he was to make mortgage and other payments and to maintain the house. It was vacant at the time of the fire. The fire was quickly extinguished, and a subsequent investigation led to the conclusion that the fire was arson caused. Defendant later filed a claim of loss for fire damage. He was subsequently charged with both aggravated arson and insurance fraud.
>
> The evidence presented at trial showed that the explosion occurred when natural gas, escaping from an uncapped nipple, was ignited by a pilot light. The explosion was followed immediately by the fire. Arson investigators testified that an accelerant, probably gasoline, had been placed in the house. Defendant was in the house at approximately 7:30 on the morning of the fire. He visited the house nearly every day. Defendant was not at the house thereafter until after the fire. A quantity of gasoline was found in a container in his truck. He was employed as a handyman and home repairman and had been working during the time of the fire. No direct evidence was presented that linked him directly to the fire, since all evidence was circumstantial. Evidence of motive showed that he was in poor financial condition, being several payments behind and under a court order concerning the house.

Id. at 485.

In the instant matter, the State cannot prove the prosecutorial misconduct harmless beyond a reasonable doubt, because the misconduct was highly prejudicial. Given the weakness of Abplanalp's testimony, the clarity of the contract requiring him to pay off the Monte Carlo, and the relative values of the S-10 and the check and Monte Carlo, see discussion of prejudice in Point I, *supra* at pages 30-31, it was not reckless of Marshall to have sold the Monte Carlo on July 30, with the expectation that Abplanalp had paid off the balance on the trade-in.

On these facts, the prosecutor's misconduct in arguing incorrectly that the credit union normally disregarded the part of the contract requiring Abplanalp to pay off the loan because deals routinely vary from the terms of the contract, in arguing incorrectly that Marshall tried to persuade Abplanalp to finance with Mountain States to hide the transaction, and in arguing incorrectly that Marshall's guilty knowledge could be inferred from his requiring Abplanalp to sign a contract for the $918.35, while supposedly relying solely on Abplanalp's word regarding the payoff, was certainly prejudicial. Cf. Troy, *supra*.

C. PRESERVATION

This Court should grant relief on this point, despite the fact that trial counsel did not object to the prosecutor's erroneous closing arguments, and may do so on the bases of the plain error, and/or ineffective assistance of counsel doctrines, explained above.

The law requiring prosecutors to argue the evidence accurately has been in place for years in this State, and in failing to assert and apply this clear law, both trial counsel and the trial court performed in an objectively deficient manner. See, Troy, *supra*. The error was prejudicial, because it deprived Marshall of a fair trial, in a case wherein the government's proof was weak, as discussed above.

Given the weakness of Abplanalp's testimony, the clarity of the contract requiring him to pay off the Monte Carlo, and the relative values of the S-10 and the check and Monte Carlo, it was not reckless of Marshall to have sold the Monte Carlo

on July 30, with the expectation that Abplanalp had paid off the balance on the trade-in.

On these facts, the prosecutorial misconduct in arguing incorrectly that the credit union normally disregarded the part of the contract requiring Abplanalp to pay off the loan because deals routinely differ from the contracts, in arguing incorrectly that Marshall tried to persuade Abplanalp to finance with Mountain States to hide the transaction, and in arguing incorrectly that Marshall's guilty knowledge could be inferred from his requiring Abplanalp to sign a contract for the $918.35, while supposedly relying solely on Abplanalp's word regarding the payoff, was certainly prejudicial.

The prejudice from these plain errors thus allows this Court to correct the errors under the plain error and/or ineffective assistance of counsel doctrines. See, Eldredge, Parsons, *supra*.

III.
REVERSAL IS REQUIRED AS A RESULT OF INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

To demonstrate ineffective assistance of counsel, Marshall must demonstrate that trial counsel's performance fell below objectively reasonable standards of representation, and that this objectively deficient performance was prejudicial. See e.g. Parsons v. Barnes, 871 P.2d 516, 521 (Utah), cert. denied 513 U.S. 966 (1994).

One of the most basic duties of a trial lawyer is to properly raise and preserve

all issues in the lower court. See, e.g., State v. Smedley, 2003 UT App 79 at ¶ 10, 67 P.3d 1005. When a defense lawyer fails to assert beneficial law and seek accurate jury instructions based on the current law, this constitutes objectively deficient performance, which will not be excused by this Court with hypothetical tactical bases. See, State v. Moritzsky, 771 P.2d 688, 692 (Utah App. 1989) (trial counsel's failure to seek jury instruction reflecting current law beneficial to the client was objectively deficient oversight of the law, which could not conceivably have been valid trial strategy).

A. DEFICIENT PERFORMANCE

In addition to permitting her client to go through an entire criminal trial in the absence of district court jurisdiction, and failing to object to or counter the prosecutor's improper arguments, see Points I and II, *supra*, trial counsel performed in an objectively deficient and prejudicial manner in numerous other instances, which cannot be fairly characterized as reflecting reasonable trial strategy.

1. Joinder of Cases

Courts recognize that the joinder of unrelated counts may prejudice a jury by causing the jurors to stigmatize a defendant, rather than assessing the evidence of guilt or innocence. See, e.g., State v. Germonto, 868 P.2d 50, 60 (Utah 1993) (joinder statute must not be misinterpreted to allow the misjoinder of offenses and cause prejudice to defendants by causing jurors to convict on the basis of stigma, rather than evidence).

In Marshall's case, trial counsel did not oppose the joinder, but affirmatively moved to join the largely unrelated felony and misdemeanor cases (R. 132 at 3-4).

While the trial court hypothesized at the hearing on the motion for a certificate of probable cause that this may have been valid trial strategy for Marshall to come to court and freely admit his guilt of the misdemeanors to impress the jurors with his candor in denying the felony (R. 291 at 17), the record demonstrates that trial counsel was not acting with any such strategy in mind.

In opening statement and in closing argument, she challenged the equity skimming count, but did not concede or address Marshall's guilt of the misdemeanor licensing violations (R. 267 at 8-10, R. 268 at 277-284). When the State began the trial with the seven witnesses on the misdemeanor licensing counts (R. 267 at 15-17, 20-27, 29-31, 33-35, 36-39, 41, 43-50, 52-55), trial counsel interposed objections and asked multiple futile questions trying to refute the fact that Marshall was a salesperson who should have been licensed (R. 267 at 18-19, 21-22, 27-28, 32-33, 35, 39-41, 50-52). It was only in the defense case that she introduced evidence that Marshall was indeed a salesperson (e.g. R. 268 at 141, 152, 208-210).

Given this record, trial counsel's motion to join the cases cannot be justified as reasonable trial strategy, but constitutes objectively deficient performance, because it demonstrated to the jurors that Marshall would put up a futile defense to the four counts he was obviously guilty of, and may well have influenced them to convict on the felony count on the basis of the stigma attendant to the misdemeanor counts and

bogus defenses, rather than on the basis of the evidence. But see, e.g., Germonto, *supra*.

2. Production of Blank Authorization for Payoff Form and Failure to Establish Foundation for Abplanalp's Actual File

After Abplanalp testified to signing a "title release" form, trial counsel presented a blank "authorization for payoff" form (Plaintiff's Exhibit 6), and then led Abplanalp to testify this was the title release form he referred to, which he signed and which required Mountain States to pay off the loan (R. 267 at 76, 78-80).

Trial counsel called Chade Abplanalp and led him to testify that Marshall told Abplanalp that Marshall would take care of the lien on the Monte Carlo, and that he believed that Mountain States would pay off the lien and get the title, based on what Marshall told him (R. 268 at 258-59). Abplanalp testified that it would surprise him if his Mountain States file did not contain an authorization for payoff form, and trial counsel tried to present him with his file to show that there was none, but the trial court sustained the prosecutor's objection to lack of foundation (R. 268 at 262).

Trial counsel never presented any foundation or witness to establish that the file, which lacked the form, was complete, despite having the owners and managers and Marshall and the secretary available to testify (T. 268 at 150-201, 208-257).

In his rebuttal closing argument, the prosecutor relied most heavily on the authorization for payoff form presented by trial counsel.[15]

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[15]He argued,

Trial counsel's presentation of the blank authorization for payment form, combined with her failure to present the complete file which did not contain a completed form, cannot be characterized as reasonable trial strategy, because trial counsel was supposed to be zealously representing Mr. Marshall, but instead, and as a result of deficient performance, rather than the merits of the evidence at issue, ended up supporting the State's case. But see, e.g., Crane v. Kentucky, 476 U.S. 683, 690 (1986) (explaining criminal defendant's constitutional rights to present his defense and confront the State's case).

3. Failure to Cross-examine Abplanalp Regarding Key Inconsistent Statements

When Abplanalp testified at trial that Marshall told him that Mountain States

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> Let me just focus on what I consider the smoking gun.
>
> Exhibit No. 6. Exhibit No. 6. Remember this one? Authorization for payoff. Why do I consider that a smoking gun? Let me tell you why I consider that a smoking gun. Because you see Chade Abplanalp purchased one vehicle. He traded a vehicle in. This was the first time he did it on his own. Chade Abplanalp first described it as a title release, right? He described what went into that document.
>
> How could he have known that that document even existed if he had not seen it before? He's purchased one vehicle. He knew that that document contained information concerning a bank account, specifically the payoff for the Monte Carlo. You want to know why he knew that? Because he signed it.
>
> Who did he give it to? Leon Sprouse? No. The other Mr. Sprouse? No. Who did he give it to? Dustin Marshall. Okay. He knew. That bolsters Chade's testimony, okay? It makes his story more reasonable because he knew that particular document. Not only did he know that document, he specifically knew what went into that document, and that was details on how to pay off the Monte Carlo.

(R. 268 at 286-87).

would pay off the Monte Carlo and had him fill out the authorization for payoff to facilitate the pay off by the dealership, trial counsel did not cross-examine Abplanalp with his prior testimony under oath at the preliminary hearing that he and Marshall did not discuss who would pay off the loan, that Abplanalp did not sign any papers with regard to that issue during the transaction, and that Abplanalp only assumed that Mountain States would pay off the Monte Carlo (R. 132 at 9-10, 12-14, 19).

Trial counsel also failed to cross-examine Abplanalp about his inconsistent statements regarding when he supposedly learned he was supposed to pay off the Monte Carlo,[16] about when he knew he had to borrow an additional $918.35 to buy the S-10,[17] and about whether he ever talked to Marshall on the phone.[18]

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[16] Abplanalp testified that he assumed that Mountain States would pay Mountain America the $3,500 balance, until he brought the $10,000 check toward the purchase of the S-10 to Mountain States (R. 267 at 61-62). In contrast, Abplanalp testified that when he called Mountain States about a month after buying the S-10 to check on the new license plates, Marshall said that Abplanalp was responsible to pay off the Monte Carlo, and that Mountain States needed him to do so in order to obtain the title to the Monte Carlo, which they had sold to different customers (R. 267 at 65).

[17] He testified that he knew from the outset that he needed to borrow $10, 918.35 and applied for the loan in that amount (R. 267 at 109; R. 268 at 267), but also testified that he only learned of the $918.35 after bringing the check for $10,000 to the dealership (R. 268 at 265).

[18]Abplanalp disputed Marshall's testimony that they talked on the phone, and said that he did not own a phone at the time, although he acknowledged that he could have been reached at his mother's, but was never there (R. 268 at 264, 267). He had testified earlier that it was when he called Mountain States about a month after buying the S-10 to check on the new license plates, Marshall said

Trial counsel's failure to cross-examine Abplanalp about these inconsistent statements cannot fairly be characterized as valid trial strategy. Abplanalp's testimony was essential to the State's case on the equity skimming count. Trial counsel not only cross-examined Ablanalp when the State called him, but also called him herself in the defense case, and thus was not trying to go easy on a sympathetic witness in front of the jury. She should have fulfilled Marshall's constitutional rights to confront his accuser by asking the key questions undermining his credibility. See Constitution of Utah, Article I § 12, United States Constitution, Amendment VI, State v. Johns, 615 P.2d 1260, 1264 (Utah 1980) (Confrontation Clause permits accused to introduce "all relevant and admissible evidence).

4. Introduction of Odometer Fraud Evidence

While trial counsel may have had a valid trial strategy in mind in calling Leon Sprouse to explain that the low mileage on the S-10 justified the price of the truck, and thus counseled against believing that Marshall would have agreed to pay off the Monte Carlo's balance,[19] once the prosecutor effectively established that someone

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that Abplanalp was responsible to pay off the Monte Carlo, and that Mountain States needed him to do so in order to obtain the title to the Monte Carlo, which they had sold to different customers (R. 267 at 65). He also testified that he called Marshall to tell him the Mountain America would "only" lend him $10,000 (R. 268 at 267).

[19]Trial counsel introduced the invoice showing that he purchased the S-10 for $12,435 at an auction in Denver before Abplanalp bought it from the dealership, including transportation charges of $250 (R. 268 at 178-79, 185). This invoice reflects mileage of 32,045 (Plaintiff's Exhibit 10). He testified based on mileage and other factors, the NADA value of the S-10 would have been $14, 225

at Mountain States committed odometer fraud,[20] see Utah Code Ann. § 41-1a-1310 (odometer fraud statute), trial counsel had no business calling the secretary of the company to establish that the company engaged in this conduct as a matter of course.[21] Trial counsel had no business leading Abplanalp to testify that the odometer statement he signed, which did not reflect the mileage incurred by Sprouse's wife's three hundred and fifty plus miles of driving, was accurate.[22] This cast substantial doubt on the overall credibility of the used car business, and its employees who testified in Marshall's behalf.

(R. 268 at 181-183).

[20]On cross-examination, the prosecutor established that the S-10 was hauled to Vernal from Denver, and that Leon Sprouse's wife drove the S-10 at least 350 miles, from Vernal to Neola and back, and to Salt Lake City and back, and around town (R. 268 at 194-96). The title from the sale of the S-10 to Ablanalp reflected the same mileage as the invoice from the Denver auction – 32,045 (R. 268 at 197-198). The odometer disclosure statement reflected mileage of 32,050, reflecting that the car had only been driven five miles since it was purchased in Denver (R. 268 at 199).

[21]Trial counsel called Michelle Mansfield, secretary at Mountain States, and evoked her testimony that all cars purchased by Mountain States come with odometer statements reflecting their mileage at the time Mountain States acquires them, and that the computer prints odometer statements at the time of the sale of the cars to customers which reflect the mileage noted by the company mechanics when the cars first come to Mountain States, and do not reflect the additional mileage which may be incurred in test-drives and usage after Mountain States takes possession of the cars (R. 268 at 252-53). The odometer statements read as though they reflect the mileage of the cars when they leave Mountain States with the customers (R. 268 at 256).

[22]Trial counsel led Abplanalp to testify that he signed the odometer statements for the Monte Carlo and the S-10, and that the odometer statement for the S-10 was accurate (R. 268 at 263-64).

In again undermining Marshall's position with unnecessary evidence, counsel failed to zealously represent her client, and instead again supported the government's position, performing in an objectively deficient manner. But see, e.g., Parsons, *supra*.

5. Failure to Seek Helpful Jury Instructions

Trial counsel did not seek any instructions on the law referred to by Leon Sprouse, which put the burden on Abplanalp to produce the title within forty-eight hours of the delivery of the Monte Carlo (R. 268 at 191), despite the fact that the law is consistent with this testimony and would have supported Marshall's defense that he reasonably believed on July 30th that the title was in order when he sold the Fausetts the Monte Carlo. See Utah Code Ann. §§ 41-1a-702 (3) (generally requiring the seller of a car to deliver the title within forty-eight hours of delivering the car); and 41-1a-1310 (classifying failure to deliver the title as a class B misdemeanor).

Trial counsel's failure to assert helpful law on Marshall's behalf constituted objectively deficient performance. See, e.g., Mortizky, *supra*.

6. Other Instances of Ineffective Assistance

Trial counsel introduced testimony from the manager of the car lot that Mountain States normally fills out forms when customers are going to pay off balances on car loans (R. 268 at 157), evidence which supported Abplanalp's position and undermined Marshall's.

Trial counsel introduced evidence that Abplanalp told his mother a few days before he traded in the Monte Carlo and got the S-10 that the agreement was that

Mountain States would pay off the Monte Carlo (R. 267 at 87-88), evidence which supported Abplanalp's position and undermined Marshall's.

Trial counsel did not object when Shelly Sorenson testified that dealerships normally pay off balances on cars that are traded in, and that this norm is what led her to assume that Mountain States would be paying off the Monte Carlo (R. 267 at 111). Nor did counsel counter this with Sorenson's earlier testimony that most of the time, it is specified in the contracts when dealerships are going to make payoffs (R. 267 at 105).

In introducing evidence helpful to the State's case, and in failing to object to or counter speculative evidence helpful to the State's case, counsel could not have been acting under reasonable trial strategy, but instead performed in an objectively deficient manner. See, e.g., Moritzsky, *supra*.

B. PREJUDICE

Individually, and certainly cumulatively, trial counsel's many instances of failing to assert the law on her client's behalf, and of introducing and failing to challenge harmful evidence, prejudiced Marshall's case.

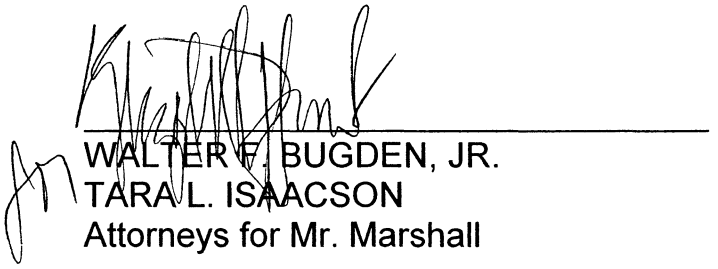
Given the weakness of Abplanalp's testimony, the clarity of the contract requiring him to pay off the Monte Carlo, and the relative values of the S-10 and the check and Monte Carlo, see discussion of prejudice, *supra*, at pages 30-31, it was not reckless of Marshall to have sold the Monte Carlo on July 30, with the expectation that Abplanalp had paid off the balance on the trade-in.

Given the substantial likelihood of a different result in the absence of trial counsel's objectively deficient performance, this Court should reverse Marshall's convictions on the basis of ineffective assistance of counsel. See, Parsons; Moritzsky, *supra*.

CONCLUSION

This Court should reverse Mr. Marshall's convictions and remand this matter to the trial court for further proceedings consistent with the foregoing law.

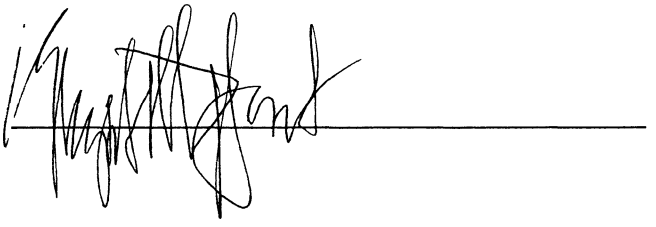
Respectfully submitted June 16, 2004.



WALTER F. BUGDEN, JR.
TARA L. ISAACSON
Attorneys for Mr. Marshall

CERTIFICATE OF MAILING

I hereby certify that I mailed two true and correct copies of the foregoing opening brief of appellant to Utah Attorney General Mark Shurtleff, 160 East 300 South, Suite 600, P.O. Box 140854, Salt Lake City, Utah 84114-0854, on June 16, 2004.



ADDENDUM

TRIAL COURT RULINGS

RULING DENYING MOTION FOR A NEW TRIAL
(to be forwarded upon transcription)

RULING GRANTING CERTIFICATE OF PROBABLE CAUSE

THE COURT: And I'm not deciding that issue. I'm just -- I just sought to -- since you didn't seem to be aware of all the facts and wasn't understanding his argument, I was trying to give you the gist of his argument.

MR. BUGDEN: I think his argument is off base.

THE COURT: Clearly there were facts in this case that support the jury verdict. I -- there were facts that would have supported the jury verdict of not guilty, too. The jury ultimately is the finder of fact, had to decide which facts -- which version of the facts that they believed.

The failure to raise this defense is clearly not the type of thing where I think there's a substantial likelihood. It's the standard. That doesn't raise the substantial issue of law, in my judgment, at least, because this is what the statute says. The statute defines the defense -- in this case the equity skimming -- if the accused proves by preponderance of the evidence that the lease obligation or security interest has been satisfied within 30 days following the transfer of the vehicle.

All of the evidence at the trial from everybody -- the bank as well as the victim in the case was that that security interest had not been satisfied. It is -- that doesn't create a substantial likelihood.

Joining these things together doesn't create -- I don't think there's a substantial likelihood that that's error on the

part of defense Counsel because -- for two reasons.

While you argue that that may have hurt his credibility, defense Counsel -- trial Counsel may have thought it might have enhanced his credibility because he stood before the jury and readily admitted those charges, and I think there may have been trial -- may well have been trial strategy to place those issues which you indicate that there was no defense to before the jury and allow him the opportunity of having the jury see him stand up there and not present a defense but only admit readily to that.

Because there was no -- there really wasn't contested facts. I think that if anything it benefitted him. I can't see any indication either in this case that there is a substantial likelihood that -- of reversal based upon that issue.

Furthermore, I don't think that it's the kind of issue that I could say that but for that the jury would have found it would have been a different outcome because it just -- it was almost a side issue, and I really believe, if anything, if I were making the call that he got some benefit from the jury through the jury seeing him stand up and say, "Yeah, I made a mistake here and I'm admitting it. I don't contest that, but this is not true." So I think may have well have been a trial strategy.

Those are the two issues you've presented to me?

MR. BUGDEN: Yes, sir.

THE COURT: I will deny your motion on that issue, but I am concerned about an issue that you haven't raised, and I

don't blame you for not raising it, but I continue to have some problems with this issue of the jury instruction. I'll be glad to hear especially from Mr. Thomas on this issue, also from you, Mr. Bugden.

The jury instruction that was submitted by the State listed the elements for equity skimming but gave the wrong date. The date that they gave was the date of the first transaction, not the second transaction.

MR. BUGDEN: Well, then there was a failure of proof; wouldn't it be?

THE COURT: No, because -- listen to what I have to say and then you can make your comment. That issue has already been presented to me in a motion for directed verdict or a motion for a new trial. I preside over the trial and I listened to the evidence, and what you point out with respect to Mr. Thomas is that early on apparently from the language that you gave me in the motion at the preliminary hearing Mr. Thomas said -- because I was interested -- "Well, you know, it could be this, it could be that."

Mr. Thomas said, "No, we're interested in the second transaction," which was the transaction which occurred after July 19th where Mr. Marshall engaged in the sale of a vehicle to a person by the name of Fausett, Mr. and Mrs. Fausett.

I continue to be -- have problems with that. I had an opportunity to give a new trial or to set the matter aside, but I

believed -- because all of the arguments, all of the focus at the trial was about the second transaction. No one ever suggested that anything inappropriate happened on July 19th.

In a prior motion Ms. Barton-Coombs argued to me that indeed they couldn't find him guilty of an offense on July 19th because that didn't involve the requirements of the statute, and I continue to think that she's right, but I continue to be bothered by it, and I know you're new into this, but I continue to be bothered by that issue because although the date isn't an element of the crime at issue. So you can't argue it.

Now, I don't expect you to argue now about -- after reflecting on it, but they didn't meet their elements because the date's not right. They were directed in the jury instruction toward a specific date which was not dates the crime occurred. That's really my problem.

MR. BUGDEN: So wouldn't it then--

THE COURT: Would you like to stand and (inaudible)?

MR. BUGDEN: --divert the jury's attention to the wrong transaction?

THE COURT: Well--

MR. BUGDEN: Wouldn't it focus the jury's attention on the transaction number one?

THE COURT: I think you need to argue not ask.

MR. BUGDEN: Well, I'm just hearing the issue from you that you've sua sponte brought to our attention, but I guess I

arguments that I guess could have been made to make this jury instruction make sense, but it's inconsistent with the State's theory.

It's certainly -- I don't have case law on the tip of my tongue, but the defendant is always entitled to have the jury correctly instructed on what the law is. In this case the jury should have been told about how they were to interpret the first transaction and the second transaction and if they did have a relationship with one another. There should have been instructions explaining how they had to interpret those two things.

But again, you were at the trial, but it sounds like there was no way that there could have been an intent formed or no evidence, no evidence in the record that would support an intent having been formed on July 19th. So apparently there's plain error in the case on the jury instructions.

THE COURT: Well, I don't think it's plain error. I've had my opportunity on this one, and I presided over the trial and heard the evidence, and I believe that there's evidence there that if the jury believed the evidence they would -- they could find the defendant guilty beyond a reasonable doubt as they did.

The statute, though, says that you're guilty of this offense if you're a dealer or broker, and he was a dealer or broker under the statute on both transactions.

Secondly it says, "Intentionally, knowingly or

recklessly transferred or arranged the transfer of a vehicle for consideration of profit." Both of those transactions would have been an intentional and knowing transfer of a vehicle. In the first instance from Mr. Albplanalp to Mountain States, and the second from Mountain States to Mr. and Mrs. Fausett, when he knew or should have known the vehicle was subject to a security interest.

I was surprised that maybe Mr. Thomas -- I hope I'm remembering this correct, and apparently you didn't, but I thought I heard testimony from -- and it's been awhile, it's been August -- from the bank and Mr. Albplanalp, the bank employee and Mrs. Albplanalp that he admitted that he knew that there was a security interest on the property.

MR. THOMAS: There was testimony.

THE COURT: So I think that based upon that, he would have known in both transactions. And it says without first obtaining written authorization of the holder of the security interest, and I suppose that the evidence is -- on reflection -- maybe stronger that he committed the offense on September the 19th because he clearly didn't obtain written authorization of the holder of the security interest. He did all the other things, and so maybe it stands based upon the instruction that was given.

My problem was is that the whole focus of the trial was for another date. It was for the second date. Nobody argued, nobody intimated, there were no questions that would suggest that

Mr. Marshall violated the law on July 19th, although looking at these elements he may have. He may have in fact violated the law. That may have been the genesis for my question at preliminary hearing.

I don't think the jury focused on the 19th. I think it was clear to the jury that everybody was concerned about the Esther -- not Esther Fausett but Mr. and Mrs. Fausett's purchase of the vehicle.

If I thought otherwise, or if I thought that it was reasonably likely that they were focusing on the wrong date, I would have granted Ms. Barton-Coombs' motions.

MR. BUGDEN: But isn't that conjecture, with all due respect, your Honor?

THE COURT: No.

MR. BUGDEN: Isn't that--

THE COURT: Be seated. Be seated. But what I am concerned about here is that there is a clear error, and the court of appeals may disagree with me.

I don't feel comfortable with waiting for the court of appeals while Mr. Marshall is in prison. I think that that issue does present an issue where there is a substantial question of the law, and it's based upon the fact that there was a date that -- in the jury instruction that doesn't comport to what the State's actual transaction was.

You know, this is an issue which I've really dealt with

on several levels. As I've indicated, I had a motion for a directed verdict and a motion for a new trial.

I really believe after hearing this trial that that jury never did focus on the July 19th transaction, but I think the court of appeals may very well -- not being in my situation may be a little bit more theoretic about the issue, and I'm just going to give them an opportunity to make that call rather than put him in prison and -- you know, by the time this gets through the court of appeals he could be through with his prison sentence, and if it's reversed, then he will be -- have been -- I think the jury's verdict is sound and -- but I don't want to put him in a position where he wins on appeal and he's won nothing because he's already served his time in prison. I don't think that's right. I don't think that's the right way to do it.

I think it's a close enough issue that we can afford to put Mr. Marshall in prison later after the court of appeals has had an opportunity to look at it and review it and get just as much out of it.

So on the Court's motion, I will grant the petition upon that basis. I'll also make a finding that -- I'm anticipating an appeal being filed on that issue. You really haven't followed the statute because you were not there at the trial and you haven't focused on the issue that I'm willing to send it up on, but I'm going to assume that you're going to include that in your appeal at this point in time, Mr. Bugden.

MR. BUGDEN: I'm sure I will. I'm sure I will.

THE COURT: And I'm going to find that it's not -- if you do that that it's not interposed for delay. It's a legitimate issue. I think it's a legitimate issue.

It's very unfortunate we've got the wrong date in here. I guess I should take some responsibility for that, too, because I make a practice of pretty carefully scrutinizing the jury instructions, and I just didn't focus in on that. I think that the State has to take some responsibility for that, too, because I don't think they intended to try the matter on the July 19th event, but that's what they put in their jury instructions. So the State made a mistake in the jury instructions as to the date, and I didn't catch it.

I also don't think that he -- it's clear and convincing that I don't think that he is a danger to the community with the restrictions I'm going to put on him. First, he's going to have to file a bond. Do you already have a bond, Mr. Marshall?

MR. MARSHALL: Yes, your Honor.

THE COURT: What is it?

MR. MARSHALL: $5,000.

THE COURT: You're going to have to file a bond or get your -- a new bond or get your current bond holder to continue their bond while you're on appeal.

A lot of the bondsmen don't think that that -- that the bond goes through the appeal, so I'm going to require that you --

CONSTITUTIONAL PROVISIONS, STATUTES AND RULE

Constitution of Utah, Article I § 7

No person shall be deprived of life, liberty or property, without due process of law.

Constitution of Utah, Article I § 10

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

Constitution of Utah, Article I § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

Constitution of Utah, Article I § 13

Offenses heretofore required to be prosecuted by indictment, shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the State, or by indictment, with or without such examination and commitment. The formation of the grand jury and the powers and duties thereof shall be as prescribed by the Legislature.

United States Constitution, Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment XIV § 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Utah Code Ann. § 41-1a-702

(1) (a) To transfer a vehicle, vessel, or outboard motor the owner shall endorse the certificate of title issued for the vehicle, vessel, or outboard motor in the space for assignment and warranty of title.

(b) The endorsement and assignment shall include a statement of all liens or encumbrances on the vehicle, vessel, or outboard motor.

(2) (a) If a title certificate reflects the names of two or more people as co- owners in the alternative by use of the word "or" or "and/or," each co-owner is considered to have granted the other co-owners the absolute right to endorse and deliver title and to dispose of the vehicle, vessel, or outboard motor.

(b) If the title certificate reflects the names of two or more people as co- owners in the conjunctive by use of the word "and," or the title does not reflect any alternative or conjunctive word, the endorsement of each co-owner is required to transfer title to the vehicle, vessel, or outboard motor.

(3) The owner shall deliver the certificate of title containing the odometer disclosure statement required under Section 41-1a-902 and the certificate of registration to the purchaser or transferee at the time of, or within 48 hours after delivering the vehicle, vessel, or outboard motor, as applicable, except as provided for under Sections 41-3-301, 41-1a-519, and 41-1a-709.

Utah Code Ann. § 41-1a-1310

It is a class B misdemeanor for any person to:

(1) fail to properly endorse and deliver a valid certificate of title to a vehicle, vessel, or outboard motor to a transferee or owner lawfully entitled to it in accordance with Section 41-1a-702, except as provided for under Sections 41-3-301, 41-1a-519, and 41-1a-709;

(2) fail to give an odometer disclosure statement to the transferee as required by Section 41-1a-902;

(3) operate, or cause to be operated, a motor vehicle knowing that the odometer is disconnected or nonfunctional, except while moving the motor vehicle to a place of repair;

(4) offer for sale, sell, use, or install on any part of a motor vehicle or on an odometer in a motor vehicle any device that causes the odometer to register miles or kilometers other than the true miles or kilometers driven as registered by the odometer within the manufacturer's designed tolerance;

(5) fail to adjust an odometer or affix a notice as required by Section 41-1a- 906 regarding the adjustment;

(6) remove, alter, or cause to be removed or altered any notice of adjustment affixed to a motor vehicle as required by Section 41-1a-906;

(7) fail to record the odometer reading on the certificate of title at the time of transfer; or

(8) accept or give an incomplete odometer statement when an odometer statement is required under Section 41-1a-902.

Utah Code Ann. §41-3-201

(1) As used in this section, "new applicant" means a person who is applying for a license that the person has not been issued during the previous licensing year.

(2) A person may not act as any of the following without having procured a license issued by the administrator: a dealer, salvage vehicle buyer, salesperson, manufacturer, transporter, dismantler, distributor, factory branch and representative, distributor branch and representative, crusher, remanufacturer, and body shop.

(3) (a) A person may not bid on or purchase a vehicle with a salvage certificate as defined in Section 41-1a-1001 at or through any motor vehicle

auction unless the person is a licensed salvage vehicle buyer.

(b) A person may not offer for sale, sell, or exchange a vehicle with a salvage certificate as defined in Section 41-1a-1001 at or through any motor vehicle auction except to a licensed salvage vehicle buyer.

(4) A supplemental license shall be secured by a dealer, manufacturer, remanufacturer, transporter, dismantler, crusher, or body shop for each additional place of business maintained by him.

(5) A person who has been convicted of any law relating to motor vehicle commerce or motor vehicle fraud may not be issued a license unless full restitution regarding those convictions has been made.

(6) (a) The division may not issue a license to a new applicant for a new or used motor vehicle dealer license unless the new applicant completes an eight- hour orientation class approved by the division that includes education on motor vehicle laws and rules.

(b) The approved costs of the orientation class shall be paid by the new

applicant.

(c) The class shall be completed by the new applicant and the applicant's partners, corporate officers, bond indemnitors, and managers.

(d) The division shall approve:

(i) providers of the orientation class; and

(ii) costs of the orientation class.

Utah Code Ann. § 76-6-522

(1) As used in this section:

(a) "Broker" means any person who, for compensation of any kind, arranges for the sale, lease, sublease, or transfer of a vehicle.

(b) "Dealer" means any person engaged in the business of selling, leasing, or exchanging vehicles for compensation of any kind.

(c) "Lease" means any grant of use or possession of a vehicle for consideration, with or without an option to buy.

(d) "Security interest" means an interest in a vehicle that secures payment or performance of an obligation.

(e) "Transfer" means any delivery or conveyance of a vehicle to another from one person to another.

(f) "Vehicle" means every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, or through the air or water, or over land and includes a manufactured home or mobile home as defined in Section 41-1a-102.

(2) A dealer or broker or any other person in collusion with a dealer or broker is guilty of equity skimming of a vehicle if he transfers or arranges the transfer of a vehicle for consideration or profit, when he knows or should have known the vehicle is subject to a lease or security interest, without first obtaining written authorization of the lessor or holder of the security interest.

(3) Equity skimming of a vehicle is a third degree felony.

(4) It is a defense to the crime of equity skimming of a vehicle if the accused proves by a preponderance of the evidence that the lease obligation or security interest has been satisfied within 30 days following the transfer of the vehicle.

Utah Code Ann. § 77-1-6

(1) In criminal prosecutions the defendant is entitled:

(a) To appear in person and defend in person or by counsel;

(b) To receive a copy of the accusation filed against him;

(c) To testify in his own behalf;

(d) To be confronted by the witnesses against him;

(e) To have compulsory process to insure the attendance of witnesses in his behalf;

(f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;

(g) To the right of appeal in all cases; and

(h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.

(2) In addition:

(a) No person shall be put twice in jeopardy for the same offense;

(b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;

(c) No person shall be compelled to give evidence against himself;

(d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and

(e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.

Utah Rule of Criminal Procedure 7

(a) When a summons is issued in lieu of a warrant of arrest, the defendant shall appear before the court as directed in the summons.
(b) When any peace officer or other person makes an arrest with or without a warrant, the person arrested shall be taken to the nearest available magistrate for setting of bail. If an information has not been filed, one shall be filed without delay before the magistrate having jurisdiction over the offense.
(c)(1) In order to detain any person arrested without a warrant, as soon as is reasonably feasible but in no event longer than 48 hours after the arrest, a determination shall be made as to whether there is probable cause to continue to detain the arrestee. The determination may be made by any magistrate, although if the arrestee is charged with a first degree felony or a capital offense, the magistrate may not be a justice court judge. The arrestee need not be present at the probable cause determination.
(c)(2) A written probable cause statement shall be presented to the magistrate, although the statement may be verbally communicated by telephone, telefaxed, or otherwise electronically transmitted to the magistrate.
(c)(2)(A) A statement which is verbally communicated by telephone shall be reduced to a sworn written statement prior to submitting the probable cause issue to the magistrate for decision. The person reading the statement to the magistrate shall verify to the magistrate that the person is reading the written statement verbatim, and shall write on the statement that person's name and title, the date and time of the communication with the magistrate, and the determination the magistrate directs to be indicated on the statement.
(c)(2)(B) If a statement is verbally communicated by telephone, telefaxed, or otherwise electronically transmitted, the original statement shall, as soon as practicable, be filed with the court where the case will be filed.
(c)(3) The magistrate shall review the probable cause statement and from it determine whether there is probable cause to continue to detain the arrestee.

(c)(3)(A) If the magistrate finds there is not probable cause to continue to detain the arrestee, the magistrate shall order the immediate release of the arrestee.
(c)(3)(B) If the magistrate finds probable cause to continue to detain the arrestee, the magistrate shall immediately make a bail determination. The bail determination shall coincide with the recommended bail amount in the Uniform Fine/Bail Schedule unless the magistrate finds substantial cause to deviate from the Schedule.
(c)(4) The presiding district court judge shall, in consultation with the Justice Court Administrator, develop a rotation of magistrates which assures availability of magistrates consistent with the need in that particular district. The schedule shall take into account the case load of each of the magistrates, their location and their willingness to serve.
(c)(5) Nothing in this subsection (c) is intended to preclude the accomplishment of other procedural processes at the time of the determination referred to in paragraph (c)(1) above.
(d)(1) If a person is arrested in a county other than where the offense was committed the person arrested shall without unnecessary delay be returned to the county where the crime was committed and shall be taken before the proper magistrate under these rules.
(d)(2) If for any reason the person arrested cannot be promptly returned to the county and the charge against the defendant is a misdemeanor for which a voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21(1), the person arrested may state in writing a desire to forfeit bail, waive trial in the district in which the information is pending, and consent to disposition of the case in the county in which the person was arrested, is held, or is present.
(d)(3) Upon receipt of the defendant's statement, the clerk of the court in which the information is pending shall transmit the papers in the proceeding or copies of them to the clerk of the court for the county in which the defendant is arrested, held, or present. The prosecution shall continue in that county.
(d)(4) Forfeited bail shall be returned to the jurisdiction that issued the warrant.
(d)(5) If the defendant is charged with an offense other than a misdemeanor for which a voluntary forfeiture of bail may be entered as a conviction under Subsection 77-7-21(1), the defendant shall be taken without unnecessary delay before a magistrate within the county of arrest for the determination of bail under Section 77-20-1 and released on bail or held without bail under Section 77-20-1.
(d)(6) Bail shall be returned to the magistrate having jurisdiction over the offense, with the record made of the proceedings before the magistrate.
(e) The magistrate having jurisdiction over the offense charged shall, upon the defendant's first appearance, inform the defendant:
(e)(1) of the charge in the information or indictment and furnish a copy;
(e)(2) of any affidavit or recorded testimony given in support of the information and how to obtain them;
(e)(3) of the right to retain counsel or have counsel appointed by the court without expense if unable to obtain counsel;
(e)(4) of rights concerning pretrial release, including bail; and
(e)(5) that the defendant is not required to make any statement, and that the statements the defendant does make may be used against the defendant in a court of law.
(f) The magistrate shall, after providing the information under paragraph (e) and before proceeding further, allow the defendant reasonable time and opportunity to consult counsel and shall allow the defendant to contact any attorney by any reasonable means, without delay and without fee.

(g) If the charge against the defendant is a misdemeanor, the magistrate shall call upon the defendant to enter a plea.
(g)(1) If the plea is guilty, the defendant shall be sentenced by the magistrate as provided by law.
(g)(2) If the plea is not guilty, a trial date shall be set. The date may not be extended except for good cause shown. Trial shall be held under these rules and law applicable to criminal cases.
(h)(1) If a defendant is charged with a felony, the defendant shall be advised of the right to a preliminary examination. If the defendant waives the right to a preliminary examination, and the prosecuting attorney consents, the magistrate shall order the defendant bound over to answer in the district court.
(h)(2) If the defendant does not waive a preliminary examination, the magistrate shall schedule the preliminary examination. The examination shall be held within a reasonable time, but not later than ten days if the defendant is in custody for the offense charged and not later than 30 days if the defendant is not in custody. These time periods may be extended by the magistrate for good cause shown. A preliminary examination may not be held if the defendant is indicted.
(i)(1) Unless otherwise provided, a preliminary examination shall be held under the rules and laws applicable to criminal cases tried before a court. The state has the burden of proof and shall proceed first with its case. At the conclusion of the state's case, the defendant may testify under oath, call witnesses, and present evidence. The defendant may also cross-examine adverse witnesses.
(i)(2) If from the evidence a magistrate finds probable cause to believe that the crime charged has been committed and that the defendant has committed it, the magistrate shall order, in writing, that the defendant be bound over to answer in the district court. The findings of probable cause may be based on hearsay in whole or in part. Objections to evidence on the ground that it was acquired by unlawful means are not properly raised at the preliminary examination.
(i)(3) If the magistrate does not find probable cause to believe that the crime charged has been committed or that the defendant committed it, the magistrate shall dismiss the information and discharge the defendant. The magistrate may enter findings of fact, conclusions of law, and an order of dismissal. The dismissal and discharge do not preclude the state from instituting a subsequent prosecution for the same offense.
(j) At a preliminary examination, the magistrate, upon request of either party, may exclude witnesses from the courtroom and may require witnesses not to converse with each other until the preliminary examination is concluded. On the request of either party, the magistrate may order all spectators to be excluded from the courtroom.
(k)(1) If the magistrate orders the defendant bound over to the district court, the magistrate shall execute in writing a bind-over order and shall transmit to the clerk of the district court all pleadings in and records made of the proceedings before the magistrate, including exhibits, recordings, and any typewritten transcript.
(k)(2) When a magistrate commits a defendant to the custody of the sheriff, the magistrate shall execute the appropriate commitment order.
(l)(1) When a magistrate has good cause to believe that any material witness in a pending case will not appear and testify unless bond is required, the magistrate may fix a bond with or without sureties and in a sum considered adequate for the appearance of the witness.
(l)(2) If the witness fails or refuses to post the bond with the clerk of the court, the magistrate may commit the witness to jail until the witness complies or is otherwise legally discharged.

(l)(3) If the witness does provide bond when required, the witness may be examined and cross-examined before the magistrate in the presence of the defendant and the testimony shall be recorded. The witness shall then be discharged.
(l)(4) If the witness is unavailable or fails to appear at any subsequent hearing or trial when ordered to do so, the recorded testimony may be used at the hearing or trial in lieu of the personal testimony of the witness.